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Paying the Price for Sports TV: Preventing the Strategic Misuse of the FCC's Carriage Regulations

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Paying the Price for Sports TV: Preventing the Strategic Misuse of the FCC's Carriage Regulations

David Hutson*

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I. INTRODUCTION

Televised sporting events are an important part of American culture. Sports leagues and cable companies have embarked on courses of vertical integration¹ to reap the financial benefits of the public's love of sports. These parallel courses of vertical integration clash with the FCC's carriage regulations in a way that could cause cable prices to increase for the sports fan and non-sports fan alike.

FCC regulations prohibit vertically integrated cable companies from discriminating between affiliated and nonaffiliated networks. Many cable companies have vertically integrated by acquiring interests in regional sports networks (RSNs). A more recent phenomenon is the creation of cable networks by college and professional sports leagues. These leagues distribute exclusive content through vertically integrated cable networks. In some instances, because of the high prices sought by the league-owned networks, they have been unable to reach carriage agreements with cable companies. The league-owned networks could argue that cable companies are in violation of the FCC's anti-discrimination regulations by carrying their affiliated RSNs on favorable terms, but denying carriage to nonaffiliated league-owned sports networks.

1. "Vertical integration" occurs when several stages of production (e.g., producing, processing, distributing, and marketing) are brought together in one company. 58 AM. JUR. 2D *Newspapers* § 71 (2008).

This Note will argue that it would be an abuse of the FCC's regulations and against the public interest for league-owned sports networks to gain favorable carriage terms by using the anti-discrimination regulations. Sports content is expensive, and if the bargaining power of cable companies is hampered by the FCC's regulations, cable subscribers will face unreasonable price increases. The recent settlement of a carriage dispute between TCR, a cable network owned by a sports team, and Comcast, a cable company, resulted in a \$2 per month increase in cable rates for 1.6 million people. If other league-owned sports networks are able to obtain similar results in their negotiations, cable subscribers, many of whom have no interest in sports programming, will face similar price increases. Despite the fact that forcing cable companies to add expensive sports networks would be against the interest of the majority of cable subscribers, the FCC has held that it is unreasonable, and therefore prohibited, for cable companies to deny carriage to expensive nonaffiliated sports networks.

This Note will discuss a variety of possible responses by policymakers. Congress could intervene by discouraging vertical integration by cable companies or moving to an à la carte cable regime. The FCC could respond independently by making clear that its regulations only prevent unreasonable discrimination, and that discrimination by cable companies that is consistent with the public interest is not prohibited. One proposed solution to carriage negotiation impasses, mandatory binding arbitration, is an unwise idea because it unjustifiably involves the government in carriage disputes that do not result from discrimination or coercion.

II. LEAGUE-OWNED NETWORKS AND REGIONAL SPORTS NETWORKS

A. *Background: Cable Sports and Vertical Integration*

Sports are a big business. The National Football League (NFL) earns \$3.7 billion annually by selling broadcast rights to its football games.² ESPN is able to command a broadcast license fee of \$3.26 per subscriber from cable companies; YES, the network owned by George Steinbrenner which owns the rights to broadcast games played by the New York Yankees,³ commands a \$2.15 monthly license fee per subscriber.⁴ By

2. Peter Grant & Adam Thompson, *NFL Network Gets Blocked as Cable Takes Tough Stance*, WALL ST. J., Aug. 20, 2007, at A1, available at <http://online.wsj.com/article/SB118756679294202415.html>.

3. Richard Sandomir, *A Stake in the YES Network Is on the Market, but Not the Yankees' Share*, N.Y. TIMES, Aug. 3, 2007, at D5, available at <http://www.nytimes.com/>

contrast, other major cable networks like USA, CNN, or TBS charge about \$0.30 per subscriber per month.⁵ The disparity is reflective of the importance of sports media. In an age of short attention spans and a multitude of media competing for consumer attention, broadcasters are willing to pay a premium for sports programming because of its unique ability to command a viewer's attention.⁶

Sports leagues have attempted to capture the financial benefits of cable sports by creating vertically integrated cable networks and reserving a portion of the league's content to be exclusively broadcast on that network.⁷ Cable companies have also pursued a vertical integration strategy by creating or acquiring interests in RSNs.⁸ RSNs provide sports programming relevant to a particular geographic area.⁹

B. The Roots of the Dispute Between Cable Companies and League-Owned Networks

The trend of vertical integration between (1) sports leagues and sports networks,¹⁰ and (2) cable companies and sports networks¹¹ has caused problems in negotiations between league-owned networks seeking carriage and cable companies.¹² The root of the dispute concerns whether the league-owned networks should be placed on the expanded basic tier or a special tier of service.

Cable companies are required to offer a "basic" service tier which subscribers must purchase in order to have access to other cable programming.¹³ The FCC requires that the basic tier include local broadcast

2007/08/03/sports/baseball/03yes.html?_r=1&n=Top/News/Business/Companies/Goldman%20Sachs%20Group%20Inc.&oref=slogin.

4. Grant & Thompson, *supra* note 2.

5. Joe Nocera, *Of Tiers, Football and Dollars*, N.Y. TIMES, Oct. 6, 2007, at C1, available at <http://www.nytimes.com/2007/10/06/business/06nocera.html>.

6. *See id.*

7. *See generally id.*

8. Ronald Grover, Tom Lowry & William C. Symonds, *Rumble in Regional Sports*, BUS. WEEK, Nov. 22, 2004, at 156, available at http://www.businessweek.com/magazine/content/04_47/b3909143_mz016.htm.

9. *See* Staci D. Kramer, *Empire Building: Regional Sports Networks Require Rabid Local Fans, Red-Hot Teams and a Break from an MSO*, CABLE WORLD, Mar. 25, 2002, at 18, available at http://findarticles.com/p/articles/mi_m0DIZ/is_12_14/ai_84593510.

10. For example, the NFL, Big Ten, and the NBA have such integration. *See* Grant & Thompson, *supra* note 2.

11. For example, Comcast with Versus have such integration. *See* Nocera, *supra* note 5.

12. *See id.*

13. Choosing Cable Channels, FCC Consumer Facts, <http://www.fcc.gov/cgb/consumerfacts/cablechannels.html> (last visited Jan. 30, 2009); *see also* Thomas Hazlitt, *Shedding Tiers for a la Carte? An Economic Analysis of Cable TV Pricing*, 5 J. TELECOMM. & HIGH TECH L. 253, 255 n.2 (2006).

networks and whatever public, educational, and governmental access channels local government requires.¹⁴ Additional programming, including news, sports, and “superstations,” is placed on expanded basic tiers—the level of cable service that most subscribers choose. Cable companies have increased the number of channels they broadcast on the expanded basic tier, but that expansion has been blamed for increases in price that are not justified by the viewership of those channels.¹⁵ Special tiers carry programming that may be purchased separately on an à la carte basis.¹⁶

Cable companies argue that the league-owned networks are asking a price that is too high compared to the value of the content they provide and refuse to provide carriage on their expanded basic service tiers.¹⁷ Instead, they offer to carry the league-owned networks on special tiers.¹⁸

League-owned networks, drawn into the television business by the prospect of fat subscriber fees, find the idea of placement on a special tier unacceptable.¹⁹ Not only would revenue drawn from subscribers be lower, advertising would be more difficult to sell.²⁰ The league-owned networks point to the cable-owned RSNs, which are just as expensive in terms of license fees²¹ and are placed on expanded basic service tiers, as evidence of the value of sports programming to cable companies.

C. Public Negotiations Between Cable Companies and League-Owned Networks

Cable companies and sports networks are vying for support in the political arena, as well as in the court of public opinion in an attempt to influence negotiations. In December of 2007, the New England Patriots football team took an undefeated record into the last week of the regular

14. *See id.*

15. *Increasing Cable Prices Justify Focus on Market, Martin Says*, TELECOMM. REP., Jan. 1, 2008, available at 2008 WLNR 1677 (Westlaw).

16. *See, e.g., Bill Freehling, Football Fans Don't Have Access to Big Cowboys-Packers Showdown*, THE FREE-LANCE STAR, Nov. 29, 2007, 2007 WLNR 23682952; *see also Big Game, Small TV Audience*, THE AUGUSTA CHRONICLE, Nov. 29, 2007, 2007 WLNR 25884919; *Comcast Holds Line in Big Ten Standoff: Cable Provider, Big Ten Network Continue Very Public Battle*, THE STAR-TRIBUNE, Oct. 13, 2007, 2007 WLNR 20326929.

17. *See, e.g., Tom Miller, Network, Cable Providers Clash on Channel Placement*, JANESVILLE GAZETTE (Wis.), Nov. 2, 2007, available at <http://gazettextra.com/news/2007/nov/02/cable-battles-big-ten-network/>.

18. *See id.*

19. *See, e.g., id.*

20. *See, e.g., id.*

21. Andy Grossman, *Regional Sports Networks: Cable's Ace in the Hole?*, CABLE WORLD MAG., July 17, 2006, available at <http://www.cable360.net/cableworld/business/marketing/16433.html>.

season to play the New York Giants; it was a game of national interest.²² The game was scheduled for broadcast on the NFL Network, which was, at the time, not available on the basic expanded tier of most major cable companies.²³

The NFL lobbied Congress to intervene on its behalf to the FCC but was unsuccessful.²⁴ In fact, the lobbying seemed to backfire. Despite the NFL's efforts, many in Congress were more sympathetic toward the cable companies in the dispute.²⁵ Senator John Kerry threatened to hold hearings in the Senate Commerce Committee if the NFL Network did not back down and allow wider distribution of the game.²⁶

More generally, the NFL Network has also explored the possibility of filing a complaint with the FCC.²⁷ The NFL's legal theory is that cable companies are favoring RSNs, in which they have an interest, and denying carriage on similar terms to nonaffiliated networks.²⁸ Cable companies are prohibited from discriminating between affiliated and nonaffiliated networks in carriage terms.²⁹ The sports networks would like to be able to use this law to force their way on to the expanded basic service tier alongside the cable-owned RSNs.

Outside the political realm, cable companies have affiliated themselves with Web pages³⁰ and run commercials³¹ targeted at sports fans suggesting that the sports networks are greedy and dishonest, and that the content they provide is not valuable. The sports networks have also run ads designed to motivate fans to pressure their cable company into adding their network.³²

22. The importance of this game to football fans was that, if the Patriots won, they would become the first NFL team to go 16-0 in the regular season. Only one other NFL team had ever accomplished this feat; the 1972 Miami Dolphins. *Pats' Year of Perfection Capped by Thrilling Comeback Win Over Giants*, ESPN.COM, <http://sports.espn.go.com/nfl/recap?gameId=271229019> (last visited Jan. 31, 2009).

23. *NFL Hill Lobbying on Cable Dispute May Have Backfired*, COMM. DAILY, Dec. 28, 2007, available at 2007 WLNR 25765763 (Westlaw).

24. See *id.*

25. See *id.*

26. See *id.* (Kerry addressed a letter to NFL Commissioner Roger Goodell suggesting that if the game was not aired, he would ask the committee to "examine 'how the emergence of premium sports channels' affects consumers.>").

27. See Nocera, *supra* note 5.

28. See *id.*

29. See 47 U.S.C. § 536(a)(3) (2000).

30. See, e.g., About Us, Putting Fans First, http://www.puttingfansfirst.org/pubs/about_us.cfm (last visited Jan. 30, 2009) (stating that Comcast provides corporate support).

31. *Comcast vs. Big Ten Network* (Comcast TV commercial), available at <http://www.youtube.com/watch?v=Xw3B9ooYCB0&feature=related> (arguing that the Big Ten Network should be a "choice" that not everyone should have to pay for).

32. See, e.g., *NFL Network Commercial* (NFL Network TV commercial), available at <http://www.youtube.com/watch?v=ydMxblA3Qx4> (responding to the argument that people should not have to pay for channels they do not want).

III. THE FCC'S CARRIAGE DISCRIMINATION REGULATIONS

In the 1992 Cable Act, Congress directed the FCC to adopt regulations prohibiting cable companies from discriminating in carriage agreements between affiliated and nonaffiliated networks.³³ The carriage anti-discrimination laws were adopted to prevent a network from gaining too much market power over nonaffiliated networks.³⁴ Congress provided room in the statutory language for the FCC to enforce the anti-discrimination law in a way that is consistent with the public interest.³⁵ Unfortunately, both the process by which carriage discrimination complaints are reviewed by the FCC and the language of the decision in *TCR Sports Broadcasting Holding, LLP v. Comcast Corp.*³⁶ make it unclear whether the FCC will enforce those laws in a way that benefits the public. The uncertainty seems to work to the advantage of the nonaffiliated sports networks. If the FCC's carriage regulations are not enforced in a way that is consistent with the public interest, cable rates will rise and non-sports fans will be the big losers.

A. Carriage Discrimination Regulation in the 1992 Cable Act & Analysis of the FCC's Implementation

As part of the 1992 Cable Act, Congress directed the FCC to promulgate regulations that prohibited cable companies from (1) requiring a financial interest in a network as a condition of carriage, (2) coercing the nonaffiliated networks into providing the cable company exclusive rights to programming, and (3) restraining the ability of nonaffiliated networks to compete by discriminating in favor of affiliated networks in carriage agreements.³⁷ A network is deemed affiliated if the cable company owns a five percent or greater share in the network.³⁸

33. 47 U.S.C. § 536(a) (2000).

34. See discussion *infra* Part III.A.

35. See discussion *infra* Part V.C.

36. *TCR Sports Broad. Holding v. Comcast Corp.*, *Memorandum Opinion and Hearing Designation Order*, 21 F.C.C.R. 8989 (2006) [hereinafter *TCR Order*].

37. § 536(a). The statute reads:

(a) Regulations[:] Within one year after October 5, 1992, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall--

(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming

The statute was adopted in response to concern that increasing horizontal and vertical integration in the cable industry gave cable companies too much market power.³⁹ Specifically, Congress was concerned that vertically integrated cable operators would favor affiliated programmers at the expense of nonaffiliated programmers, and that cable operators would limit access to their affiliated programmers to cable (as opposed to satellite).⁴⁰ The Senate Committee on Commerce, Science and Transportation recognized in the Senate Report accompanying the 1992 Cable Act that differences between networks would necessitate differing terms in carriage agreements, and that there should be flexibility in carriage agreement negotiations as long as it did not impede competition.⁴¹ The Committee also recognized that the exercise of market power by vertically integrated cable companies would not be a cause of concern in all situations.⁴²

The FCC adopted regulations mirroring the statutory language.⁴³ In adopting the regulations, the FCC declined to prohibit specific conduct in

distributors as a condition of carriage on a system;

(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors[.]

Id.

38. Implementation of Sections 12 and 19 of the Cable TV Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, *Second Report and Order*, 9 F.C.C.R. 2642, para. 19 (1994) [hereinafter *Competition and Diversity in Video Distribution and Carriage*].

39. *Id.* at para 2.

40. S. Rep. 102-92, at 25-26 (1992).

41. *Id.*

42. The Committee's report stated,

The Committee understands that there are many other factors that affect the bargaining between the programmer and the cable operator. As was stated earlier, the extent of market power in the cable industry varies in each locality. In addition, there are certain major programmers that are more able to fend for themselves. It is difficult to believe a cable system would not carry the sports channel, ESPN, or the news channel, CNN. In addition, the cable operator has an incentive to put on programming that increases subscribership and decreases churn. These factors counterbalance some of the Committee's concerns regarding the market power of the cable operator vis-a-vis the programmer. However, the Committee continues to believe that the operator in certain instances can abuse its locally-derived market power to the detriment of programmers and competitors. The provisions adopted in the legislation reflect that concern.

Id. at 24.

43. See 47 C.F.R. § 76.1301 (2007). The FCC's rule reads:

(a) Financial interest. No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.

negotiating carriage agreements, but reasoned that regulations mirroring the statutory language were appropriate because “[carriage discrimination] complaints will necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, to determine whether a violation has, in fact, occurred.”⁴⁴ The FCC did, however, list suggestions of behavior made by commenting parties as “useful guidelines for case-by-case inquiry.”⁴⁵

Pursuant to another provision of the 1992 Cable Act,⁴⁶ the FCC’s implementation order also established expedited procedures for handling

(b) Exclusive rights. No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(c) Discrimination. No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

Id.

44. *Competition and Diversity in Video Distribution and Carriage*, *supra* note 38, at para. 14.

45. *Id.* at para. 17. For § 536(a)(2) coercion, the statute requires:

(1) refusals to carry a service on terms and conditions that are reasonable or standard in the industry for comparable programming; (2) patterns of conduct during the course of dealing between the parties; (3) market dominance by a distributor obtaining exclusivity or ownership, or the absence of a comparable alternative distributor; and (4) the timing of agreement on financial interests or exclusivity relative to the agreement on carriage.

47 U.S.C. § 536(a)(2). For § 536(a)(3) discrimination, the statute requires:

(a) a refusal to carry an unaffiliated service without reasonable business justification; (b) assignment of significantly inferior channel positioning, or other type of inaccessibility to subscribers, as compared to competing affiliated services added to the system during the same time period; (c) unwillingness to engage in promotional support, cooperative advertising, or other similar activity performed for comparable affiliated services, without a reasonable business justification; (d) willingness to sell subscriber lists and addresses and other data useful in promotional activity only to affiliated programmers; (e) excluding unaffiliated programming services from mention in standard presentations to potential subscribers, when affiliated services are named; (f) requiring that unaffiliated services waive rights not waived by any comparable affiliated or unaffiliated service; (g) higher monthly payments to affiliated services than to comparable unaffiliated services without reasonable business justification; (h) imposing more onerous technical quality standards or requirements on an unaffiliated service; and (i) refusing to include a nonaffiliated service in comparable discount packages to those in which comparable affiliated services are offered to subscribers, without a reasonable business justification.

Competition and Diversity in Video Distribution and Carriage, *supra* note 38, at para. 13.

46. 47 U.S.C. § 536(a)(4) (2000).

complaints of violations of regulations.⁴⁷ After giving notice to the cable company, a network may file a complaint with the FCC with a request for relief.⁴⁸ The complaint, answer, and reply (and no additional pleadings) will first be reviewed by the staff to ensure the establishment of a prima facie case that one of the FCC's regulations has been violated.⁴⁹ The complaint must allege with specificity the behaviors that the network claims violate the FCC's regulations.⁵⁰ If this burden is met, most often the parties will be given the choice to submit to alternative dispute resolution (ADR) or submit factual disputes to an administrative law judge (ALJ).⁵¹ The decision of the ALJ is appealable to the FCC.⁵² The remedies available to a programming vendor include forfeiture, mandatory carriage, or modification of an existing carriage agreement.⁵³

The most important step of the complaint process seems to be the initial review of the complaint for a prima facie case. Since the FCC has declined to define with specificity the type of behaviors prohibited by the regulations, a determination that a complaint's allegations are sufficient to state a prima facie case is a significant victory for the complainant. A conclusion by the staff that the complaint alleges a prima facie case affirms that the allegations of the complainant are legally sufficient to go forward for further adjudication in front of an ALJ. Since the regulations are not specific and there is little case law, whether particular conduct in carriage negotiations is discriminatory would almost never be certain until the prima facie determination by the FCC is made.

In both cases discussed below, settlements favorable to the complainant occurred after the FCC determined that the complainant stated a prima facie case.⁵⁴ The lack of clarity (on the rather substantial margins) as to what type of behavior is prohibited by regulations leads to the necessity of an initial round of litigation to determine and clarify the law itself. The inability of negotiating parties to determine prospectively if they are engaging in illegal conduct is a problem that leads to pointless litigation.

47. See *Competition and Diversity in Video Distribution and Carriage*, *supra* note 38, at paras. 29-34.

48. *Id.* at para. 26.

49. *Id.* at para. 23.

50. *Id.*

51. *Id.* at para. 24.

52. *Id.*

53. *Id.* at para. 26.

54. See *Classic Sports Network, Inc. v. Cablevision Sys. Corp.*, *Memorandum Opinion and Hearing Designation Order*, 12 F.C.C.R. 10288 (1997); see also *TCR Order*, *supra* note 36 (discussed in more detail at *infra* Parts III.B., III.C.).

Another problem with the current complaint procedure is that it does not allow a defendant to seek dismissal of a complaint before submitting to the findings and conclusions of an ALJ. Even if a complaint holds up under *prima facie* review, there are situations in which a defendant should be able to show that the complaint should be dismissed as a matter of law.⁵⁵ The discrimination prohibited by law is discrimination that *unreasonably* restrains competition; presumably, if the defendant could show that the discrimination was reasonable, the case should be dismissed despite a *prima facie* showing of discrimination. Because the usual result of *prima facie* review seems to drive parties to settle, the inability of a defendant to argue for pre-review dismissal seems to be a significant and unjustified advantage for complainants.

B. Classic Sports Network v. Cablevision

The first complaint made under the FCC's carriage agreement regulations was made in 1997 by Classic Sports Network (Classic) against Cablevision.⁵⁶ Classic, an independent cable network broadcasting vintage sporting events, complained that Cablevision, a cable company with, at the time, 2.8 million subscribers, used coercive bargaining tactics to require an ownership stake in the network as a condition of carriage.⁵⁷ Classic claimed that, in negotiations, Cablevision CEO James Dolan demanded an equity stake in Classic in exchange for carriage.⁵⁸

Without discussion of the contents of the complaint, the Cable Services Bureau found that the complaint established a *prima facie* case and ordered the parties to resolve their dispute out of court or submit to the factual finding of an ALJ.⁵⁹ The parties soon settled out of court with Cablevision claiming that it made no concessions and Classic claiming that it received more-than-expected "consideration."⁶⁰ The dispute between the parties presumably was mooted by the sale of Classic to ESPN.⁶¹

55. See 47 U.S.C. § 536(a)(3) (2000).

56. Mark Landler, *Distribution Dispute Ensnarls Cablevision and Classic Sports*, N.Y. TIMES, Mar. 3, 1997, at D1, available at <http://query.nytimes.com/gst/fullpage.html?res=9B03E7DA1F31F930A35750C0A961958260>.

57. *Id.*

58. *Id.*

59. Classic Sports Network, Inc. v. Cablevision Sys. Corp., *Memorandum Opinion and Hearing Designation Order*, 12 F.C.C.R. 10288, paras. 6-7 (1997).

60. See Richard Sandomir, *Plus: TV Sports; Settlement Reached in Cable Fight*, N.Y. TIMES, Dec. 20, 1997, at C5, available at <http://query.nytimes.com/gst/fullpage.html?res=9F03E6D8163EF933A15751C1A961958260>.

61. See Richard Sandomir, *Disney's ESPN Unit Buying Classic Sports Programmer*, N.Y. TIMES, Sept. 4, 1997, at D7, available at <http://query.nytimes.com/gst/fullpage.html?res=9B04EEDB1530F937A3575AC0A961958260>.

C. *TCR Sports Broadcasting Holding v. Comcast*

The first case addressing discriminatory treatment by a cable company of an unaffiliated network prohibited by the 1992 Cable Act⁶² was filed in 2006. The dispute in that case arose out of an agreement made between Peter Angelos, the owner of the Baltimore Orioles baseball team, and Major League Baseball (MLB). Angelos was unhappy with the decision of MLB to allow the Washington Nationals baseball team to move from Montreal to Washington D.C., a move Angelos felt would diminish his team's market.⁶³ To get Angelos to go along with the move, MLB (then the owner of the Nationals) granted TCR, the RSN controlled by the Orioles, the exclusive broadcasting rights to Nationals games.⁶⁴ TCR was to begin broadcasting Nationals games in 2006 and Orioles games in 2007.⁶⁵

Comcast, a cable company, owned an RSN that had exclusive rights to broadcast Orioles games through 2006.⁶⁶ Comcast refused to carry TCR, and sued in state court claiming that by proposing carriage, the Orioles violated their existing broadcasting agreement with Comcast, which Comcast claimed gave it a right of first refusal to broadcasting rights to Orioles games in subsequent years.⁶⁷ Meanwhile, public dismay at the lack of television broadcast for Nationals games led the chairman of the House Government Reform Committee to hold hearings on the subject and call for the FCC to intervene.⁶⁸

TCR also filed a complaint with the FCC that alleged violations of the FCC's coercion and discrimination regulations,⁶⁹ and requested the FCC to require carriage on Comcast under the same terms and conditions it had reached with other cable companies, or under "just and reasonable" terms.⁷⁰ The FCC reviewed the complaint for sufficiency and issued a Memorandum Opinion and Hearing Designation Order.⁷¹

62. 47 U.S.C. § 536(a)(3) (2000).

63. See Richard Sandomir, *Beltway Cable Dispute: Fans Paying the Price*, N.Y. TIMES, Jun. 28, 2005, at D2, available at http://www.nytimes.com/2005/06/28/sports/baseball/28sandomir.html?_r=1&oref=slogin.

64. *TCR Order*, *supra* note 36, para. 5. The TCR network did business under the name "Mid-Atlantic Sports Network" or "MASN."

65. *Id.* at para. 6.

66. *Id.*

67. *Id.*

68. See Tim Lemke, *Nats Games to Air on Comcast Cable; Deal with Network Ends Dispute*, WASH. TIMES, Aug. 5, 2006, at A1, available at http://findarticles.com/p/articles/mi_hb5244/is_ai_n19655862.

69. The regulations are at 47 C.F.R. § 76.1301(a)-(c) (2008).

70. *TCR Order*, *supra* note 36, at para. 7.

71. *Id.*

TCR alleged on the coercion claim that Greenberg, an investment banker purporting to act on behalf of MLB, demanded a financial interest for Comcast in TCR's network.⁷² Comcast and Greenberg denied that he was acting on Comcast's behalf.⁷³ The FCC held that "TCR [] presented sufficient evidence to make a prima facie showing that Comcast *indirectly* and improperly demanded a financial interest"⁷⁴

TCR also alleged that Comcast engaged in discrimination in violation of the 1992 Cable Act by continuing to carry its RSN (Classic), and refusing to carry TCR in retaliation for MLB's awarding of Nationals broadcast rights to TCR.⁷⁵ TCR claimed that, without carriage on Comcast, it would be impossible for its network to achieve the level of subscribership it needed to be financially viable.⁷⁶

Comcast asserted that the refusal to carry TCR's network was based on (1) the pending lawsuit arising out of Comcast's claim that TCR violated a contractual right of first refusal, (2) a concern that carriage of TCR's network would displace programming already carried by Comcast, and (3) the type of programming (other than baseball) that would otherwise be carried on TCR's network.⁷⁷ The reviewing staff of the FCC held that this allegation was enough to state a prima facie case.⁷⁸

In its discussion of TCR's discrimination allegations, the Order stated:

TCR argues that without carriage by Comcast, it will be impossible for MASN to reach the necessary level of subscribership to achieve long-term financial viability, and that Comcast's refusal to carry MASN thus restrains TCR from competing fairly.⁷⁹

In finding TCR's allegation legally sufficient, the FCC implicitly held that that discrimination that causes a network to be unable to achieve "long-term financial viability" meets the standard for discrimination prohibited by 47 C.F.R. § 76.1301(c), that is, discrimination "the effect of which is to *unreasonably* restrain the ability of an unaffiliated video programming vendor to compete fairly."⁸⁰

Since TCR met its burden to show a prima facie case, the FCC directed the parties to resolve their dispute through ADR or submit to a

72. *Id.* at para. 9.

73. Thomas Heath, *FCC Asked by O's to Rule on Nats TV Stalemate*, WASH. POST, June 15, 2005, at E1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/14/AR2005061401114.html>.

74. *TCR Order*, *supra* note 36, at para. 10 (emphasis added).

75. *Id.* at para. 11.

76. *Id.*

77. *Id.* at paras. 6-12.

78. *Id.* at para. 12.

79. *Id.* at para. 11.

80. 47 C.F.R. § 76.1301(c) (2008) (emphasis added).

factual hearing before an ALJ.⁸¹ Less than a week after the FCC's order was issued, the parties agreed to a settlement.⁸² Comcast agreed to carry TCR's network in exchange for a five percent reduction in its carriage price.⁸³ Even with the rate reduction, TCR received \$1.35 per subscriber per month,⁸⁴ which led summarily to a \$2 increase in cable rates for the 1.6 million customers to whom TCR sought access.⁸⁵

D. Movement Within the FCC for Change to the Discrimination Regulations

The FCC recently issued a Notice of Proposed Rulemaking addressing procedures used in carriage complaints.⁸⁶ The FCC sought comment on whether the elements of a prima facie case should be clarified, whether timelines imposed on the resolution of the complaint process are effective, whether the complaint process should be overhauled, and whether and how independent cable networks should be able to negotiate for nationwide access (as opposed to system-by-system access) with multiple system cable operators.⁸⁷

The FCC's request for comment as to whether the elements of a prima facie case of discrimination should be clarified is particularly interesting in light of the FCC's initial hesitance to define discriminatory conduct in detail. The FCC's previous approach was to define that behavior as particular complaints were resolved.⁸⁸ This approach was exactly what caused the initial review of carriage complaints to be so crucial as a threshold matter in carriage negotiation disputes.⁸⁹

The NFL Network has lobbied for an approach which would subject carriage disputes to arbitration, even if the complaint does not allege

81. See *TCR Order*, *supra* note 36, at paras. 16-23.

82. See Lemke, *supra* note 68.

83. *Id.*

84. Ted Hearn, et al., *Through the Wire*, MULTICHANNEL NEWS, Aug. 7, 2006, at 33, available at 2006 WLNR 13625827 (Westlaw).

85. Ted Hearn, *Roberts: Let's Talk Sports: Comcast CEO Wants Industry Dialogue on Channel Costs*, MULTICHANNEL NEWS, Sept. 25, 2006, at 6, available at 2006 WLNR 16600768 (Westlaw).

86. Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage, *Notice of Proposed Rulemaking*, 22 F.C.C.R. 11222 paras. 14-18 (2007).

87. *Id.*

88. See *Competition and Diversity in Video Distribution and Carriage*, *supra* note 38, at para. 14.

89. For example, if the NFL Network and Comcast were entering negotiations under TCR, it is clear that a cable operator may not discriminate between an affiliated RSN and a nonaffiliated RSN. If the sports network is not an RSN, however, the regulation's lack of clarity might result in long rounds of negotiations.

discrimination.⁹⁰ This is an approach that former Commissioner Kevin Martin, along with twenty one members of Congress, supported.⁹¹ When asked by the House Telecommunications Subcommittee whether the FCC had authority to do this, Martin oddly pointed to the *TCR Order* dispute for support for his position that the FCC had such authority. Of course, in that case, TCR alleged discrimination. The NFL's proposal would only require a carriage dispute to require mandatory arbitration between the parties.⁹² Other commissioners questioned by the House Telecommunications Subcommittee said that they thought the FCC only has authority to arbitrate when a vertically integrated cable company was discriminating against a nonaffiliated network.⁹³ The latter view seems to be a more accurate statement of the FCC's current regulations.

IV. THE FCC'S CARRIAGE REGULATIONS ARE RIPE TO BE EXPLOITED BY LEAGUE-OWNED CABLE SPORTS NETWORKS IN A WAY THAT IS HARMFUL TO THE PUBLIC

A. *How Could League-Owned Cable Sports Networks Exploit the FCC's Regulations for Leverage in Carriage Negotiations?*

The statute and regulations governing carriage agreements were adopted to prohibit unreasonable discrimination and promote competition. League-owned nonaffiliated networks will argue that the *TCR v. Comcast* decision should be read as requiring that any cable company with an affiliated RSN provide carriage on relatively equal terms (at least in terms of subscription tier) with other sports networks if failure to do so would make it "impossible for [the nonaffiliated network] to reach the necessary level of subscribership to achieve long-term financial viability."⁹⁴ Thus, the argument would be that any cable company that owns an RSN on an expanded basic tier must provide access to the league-owned nonaffiliated networks on the same tier.

While the *TCR Order* did not provide extensive reasoning for the FCC's decision (probably because of the procedural posture of the case), the league-owned nonaffiliated networks' position has support. The policies behind the anti-discrimination legislation were the promotion of

90. See *Hot Seat: Martin Defends Cap, Dingell Says FCC Appears Broke*, CABLEFAX DAILY, Dec. 6, 2007, available at 2007 WLNR 24107394 (Westlaw).

91. See Jonathan Make, *NFL Hill Lobbying on Cable Dispute May Have Backfired*, COMM. DAILY, Dec. 28, 2007, available at 2007 WLNR 25765763 (Westlaw).

92. See Tim Lenke, *No Resolution Yet to NFL Network Dispute*, WASH. TIMES, Nov. 28, 2007, http://video1.washingtontimes.com/sportsbiz/2007/11/no_resolution_yet_to_nfl_net_wo.html.

93. *Hot Seat*, *supra* note 90.

94. *TCR Order*, *supra* note 36, at para 11.

diversity in programming and the prohibition of vertically integrated cable programmers from favoring their affiliated networks.⁹⁵ The prohibition on discrimination was enacted to promote competition in the market for cable programming.⁹⁶

League-owned cable sports networks like the Big Ten Network can claim that their presence on basic expanded tiers of service will increase competition in, and diversity of, sports programming. Since ABC's ESPN is by far the dominant sports network, networks like the Big Ten Network and NFL Network serve to increase much-needed competition in the sports broadcasting business. In terms of diversity in sports programming, the Big Ten Network carries more women's sports, and other less popular college sports—such as baseball, soccer, tennis, volleyball, swimming, and diving—than other sports networks.⁹⁷

Congress intended that the *effect* of the discrimination by the vertically integrated cable companies on competitors in the network business be an important means of distinguishing prohibited discrimination from non-prohibited discrimination.⁹⁸ Congress clearly intended to prohibit discrimination that would harm competitors, and it meant for the FCC to pay attention to the effects of discrimination in determining whether the discrimination was prohibited. The *TCR Order* seems to conclude that the effect of discrimination is unreasonable if a network would not be “financially viable” if not placed on the expanded basic tier, a cable company with an RSN on the basic expanded tier must provide equal access.⁹⁹

Sports networks like the Big Ten Network and the NFL Network can make a good argument that their financial viability requires placement on a basic expanded tier of programming. As noted above, placement on a sports tier would adversely affect subscriber fees and advertising revenue.¹⁰⁰ Since almost any network could argue that there will be far fewer subscribers who would pay for their network separately on a special tier, almost any new sports network could argue that its financial viability

95. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 § 2(b) (codified as amended at 47 U.S.C. § 521(b) (2000)).

96. S. REP. NO. 102-92, at 1 (1991).

97. See Press Release, Big Ten Announces Commitment to Event Equality for Men and Women on the Big Ten Network (June 21, 2007), available at <http://www.bigtennetwork.com/corporate/PR62107.asp>.

98. See S. REP. NO. 102-92 at 28 (“[R]elevant factors include the degree and duration of the difference and the effect of the difference on disfavored distributors.”); see also 47 U.S.C. § 536(a)(3) (2000) (directing the FCC to promulgate regulations “to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated . . . vendor to compete fairly”).

99. *TCR Order*, *supra* note 36, at para 11.

100. See discussion *supra* Part II.B.

depends on placement on the basic expanded tier. If the league-owned networks can successfully allege unreasonable discrimination by showing that their placement on a special tier would affect their financial viability, it will provide them with a great deal of leverage in carriage negotiations before litigation ever commences.

B. Exploitation of the FCC's Regulations by League-Owned Cable Sports Networks Could Lead to Unreasonable Price Increases for Cable Subscribers

For a multitude of reasons, cable price increases already significantly outpace the rate of inflation.¹⁰¹ The FCC's carriage discrimination regulations are an issue of particular public interest because the price increases associated with the addition of new sports networks on the basic expanded tier will cause cable prices to rise even faster.¹⁰² Furthermore, these price increases will not be associated with significant increases in service to subscribers. League-owned sports networks will serve niche audiences of sports fans, and, while diversity in sports broadcasting may be increased, in a broader sense, diversity in broadcasting will not be affected as more sports networks are added to the basic expanded tier of service.

As things stand, the trend of sports leagues starting networks does not seem likely to cease. Presently, some college sports conferences like the Big Ten and Mountain West conferences¹⁰³ have their own networks. The Southeastern Conference (SEC)¹⁰⁴ and the Big 12 Conference¹⁰⁵ are also exploring the idea of their own respective networks. MLB is launching a network in 2009,¹⁰⁶ the National Basketball Association (NBA) and National Hockey League (NHL) have networks available on sports tiers.¹⁰⁷

101. See generally Implementation of Section 621(A)(1) of the Cable Comms. Policy Act of 1984 as Amended by the Cable TV Consumer Protection & Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 5101 (2007).

102. See Hearn, *Roberts: Let's Talk Sports*, *supra* note 85 (stating that TCR's settlement resulted in a \$2 per subscriber increase for Comcast subscribers).

103. See Glenn Guilbeau, *SEC Explores Launching its own TV Network*, USA TODAY, June 9, 2007, http://www.usatoday.com/sports/college/football/sec/2007-06-09-tv-network_N.htm/.

104. *Id.*

105. See Statement from Bill Byrne, Dir. of Athletics, Texas A&M Univ., *Why No TV or PPV . . . Concrete Covering Update*, (on file at <http://www.aggieathletics.com/genrel/101806aaa.html>).

106. See Danielle Sessa, *MLB Network Will Broadcast 26 Games When it Debuts in 2009*, BLOOMBERG (Seattle), May 17, 2007, available at http://seattlepi.nwsource.com/baseball/316238_baseballtv18.html.

107. See Jon Lafayette, *NHL Network Picked up by Major U.S. Cable, Satellite Distributors*, TV WEEK, Oct. 8, 2007, available at http://www.tvweek.com/news/2007/10/nhl_network_picked_up_by_major.php; see also Evan Weiner, *NHL Needs to Broaden*

If all of these networks were placed on a basic expanded tier, and all resulted in price increases as great as the one TCR caused, cable subscribers would face a \$10 increase in their monthly cable bills.

The vulnerability of cable companies to carriage discrimination complaints is just another incentive for leagues to create their own sports networks. Many cable companies own RSNs.¹⁰⁸ If league-owned cable sports networks are able to use the FCC's discrimination regulations as leverage to get carriage at a high price on the expanded basic tier of cable service, it will be difficult for cable companies that own RSNs to negotiate with those networks in a way that keeps prices reasonable for subscribers.

V. SOLUTIONS

In light of the problems that exploitation of the FCC's carriage regulations pose to the public interest (discussed above),¹⁰⁹ policymakers should consider a response. The long-term outcome of carriage agreements negotiated under the current regulations will be unfair cable prices for consumers. The higher prices will not result in enhanced levels of service or significant increases in diversity or competition in cable programming.

First, the problem could be addressed through a legislative response to discourage vertical integration by cable companies (although the same result may also be achieved through a non-interventionist approach). Second, if Congress and the FCC move toward an à la carte cable regime, the issue may become irrelevant. Third, the FCC could take action independently by clarifying that the *TCR Order* and the FCC's regulations need not and should not be read to prohibit vertically integrated cable companies with RSNs from denying league-owned networks access to their basic expanded tiers if it is reasonable to do so.

A. *Force Divestiture of RSNs by Cable Companies Through Intervention or Non-Intervention*

Since the issue of discrimination by cable companies results from their ownership of RSNs, a possible solution is for Congress to discourage or prohibit vertical integration by cable companies. If cable companies did not own RSNs, there would presumably be no problem if the company decided to deny carriage to an expensive cable sports network. Furthermore, that business decision could presumably be made without a conflict of interest—the cable company would not be competing with the outside network. If the network provided a value to consumers for which

Cable Scope for Future, N.Y. SUN, Aug. 10, 2007, available at http://www.nysun.com/article/60260?page_no=2.

108. See generally, KaiserBlog, <http://www.kaiserblog.blogspot.com> (Apr. 11, 2008).

109. See discussion *supra* Part IV.B.

the cable company could reasonably raise rates, then the parties could reach a carriage agreement; if it was not a good value, FCC rules would not prohibit the provider from denying carriage on the basic/expanded tier. The interventionist approach is unlikely to be adopted if free-market orientation of recent telecommunications policy continues.

The non-interventionist approach to causing divestiture of RSNs by cable companies would be for the FCC to enforce the rules as they are and force cable companies to make the decision to divest on their own. Cable companies faced with a decision between (1) carrying expensive sports channels that they do not want to carry and charging a price to subscribers that could drive them to competitors or substitutes, and (2) divesting themselves of an RSN, it seems that any rational cable company would choose to divest.

Simplicity is a benefit of the non-interventionist approach. If carriage of league-owned sports networks truly poses a threat to the viability of cable networks, the result will be the same as forcing divestiture: cable companies will sell their interests in RSNs to avoid the FCC's discrimination regulations. It also allows for the possibility that a cable company could be commercially viable under the FCC's current regulations, even with an expanded basic tier that is bloated with expensive sports programming.

The problem with the non-interventionist approach is that, if cable companies do not divest and are able to remain financially viable, some current subscribers may not be able to afford to maintain access to cable at higher prices. Whether the decrease in access to cable television would be significant enough to justify intervention is an empirical question that, before it could be answered, would require knowledge of, among other things, how much the prices could rise. The adoption of a non-interventionist approach seems unlikely however, if for no other reason than the fact that it is unlikely to work quickly.

B. À la Carte

The importance of carriage on a basic/expanded service tier is a consequence of the current method of cable regulation which requires cable companies to offer expanded basic service tiers. There is a movement that advocates permitting subscribers to purchase cable channels (or specialized bundles of those channels) *à la carte*.¹¹⁰

110. See, e.g., Cesar Conda, *Cable à la Carte?*, NAT'L REVIEW ONLINE, Jan. 12, 2006, http://www.nationalreview.com/nrof_comment/conda200601120906.asp; Press Release, Gene Kimmelman, Statement of Gene Kimmelman in Response to FCC Chairman Kevin Martin's Support for Cable "à la Carte" Pricing Before the Senate Commerce Committee's Summit on Decency in the Media, Nov. 29, 2005, available at http://www.consumerunion.org/pub/core_telecom_and_utilities/002902.html.

The merits of cable à la carte are beyond the scope of this Note, but it is worthwhile to point out that moving to an à la carte system would probably moot any controversy over discrimination between cable-owned RSNs and other sports networks. Currently, the financial viability of nonaffiliated sports networks is partially dependant on gaining carriage on the expanded basic tier of service.¹¹¹ The object of the game, therefore, is not necessarily to be viewed by a large audience, but to obtain carriage on the basic service tier.¹¹²

In an à la carte regime, there would presumably be no “basic” tier, so the incentive to misuse the FCC’s discrimination rules would be destroyed. That is not to say that there would be no tiers. Any à la carte regime would likely include a tiering system of some sort.¹¹³ Assuming that one method of tiering could be theme-based, there would likely be a sports tier. If cable companies remain vertically integrated, there remains a potential for discrimination between affiliated RSNs, and other nonaffiliated sports networks.

One could easily argue that an à la carte system is no solution at all if it simply leads to more discrimination issues. But one of the fundamental problems with the present discrimination regime is that increases in cable prices that result from sports programming affect all customers, not just sports fans. In an à la carte system, only sports fans would be faced with price hikes that would presumably result from the potential inability of vertically integrated cable companies to deny tier placement to nonaffiliated networks. Even if an à la carte regime does not completely eliminate the problem caused by the FCC’s discrimination regulations, it limits the impact of the problem on consumers.

Former FCC Commissioner Kevin Martin has strongly supported a move to à la carte pricing, citing it as a way to decrease cable bills and decrease the amount of indecent content that is generally included with

111. See Greg Johnson, *NFL Calls Screen Play, or Is It an End Around*, L.A. TIMES, Nov. 18, 2007, at D1, available at <http://www.mediaaccess.org/news/2007%20News/1118LATimes.pdf>.

112. This assumption is based on the fact that a cable network receives a per subscriber fee for carriage. I assume, based on the prices received by networks like ESPN and YES compared with CNN (*see supra* notes 3-5), that the price a network is able to charge is based more on the value of the advertising it is able to attract rather than the absolute number of people who watch the network. Thus, because advertisers value sports programming, sports channels can obtain a high price for carriage despite the fact that they do not necessarily have high ratings. A sports network is, therefore, concerned with (1) the value of its audience to advertisers, and (2) the number of subscribers for which it can charge the cable company.

113. Hazlett, *supra* note 13, at 255, 257-58 (2006).

cable subscriptions.¹¹⁴ The cable industry argues that an à la carte system would not save consumers money, and that the current system provides a diversity of programming at a reasonable price.¹¹⁵ Some analysts say that à la carte would not lower prices without price regulation by the FCC;¹¹⁶ this may damper some enthusiasm for making the move among free-market enthusiasts. So far, the cable industry has been successful at stalling any change.¹¹⁷ At this point, it remains unclear whether the FCC will be able to muster support to make a move to an à la carte cable regime.

C. Add a Procedure That Allows Cable Companies to Seek Dismissal of a Complaint if Discrimination Between Networks is Reasonable

Since the initial review for a prima facie case seems to drive the outcome of settlements of discrimination complaints, the best way to alter the outcome of those settlements might be to change the complaint process. The FCC's unwillingness to define exactly what types of discrimination are prohibited,¹¹⁸ and its *TCR v. Comcast* holding that discrimination is unreasonable if it would cause the nonaffiliated network to be financially infeasible¹¹⁹ do not lead to carriage agreements that are in the public interest.

The reason that *some* discrimination by cable companies toward league-owned sports networks is reasonable is that it will control the price of cable on the expanded basic tier, and there will still be an ample amount and diversity of sports programming. If sports league-owned networks are able to use the discrimination rules the way that TCR did, it will lead to increases in the price of cable for the vast majority of people who are not ardent sports fans (as discussed above).

114. See Ted Hearn, *McDowell's Doubts: FCC Member Has Reservations About A La Carte*, MULTICHANNEL NEWS, Feb. 4, 2008, at 18, available at 2008 WLNR 2096995 (Westlaw); Ted Hearn, *'War on Cable' Cited in Court*, MULTICHANNEL NEWS, Feb. 11, 2008, at 18, available at 2008 WLNR 2624941 (Westlaw).

115. See Evan Hessel & Dorothy Pomerantz, *The People vs. Comcast*, FORBES.COM, Jan. 28, 2008, available at http://www.forbes.com/forbes/2008/0128/076_print.html.

116. See Ted Hearn, *The Winds of Change: Potential Reform of the FCC Could go in Many Directions*, MULTICHANNEL NEWS, Jan. 28, 2008, at 37, available at 2008 WLNR 1614821 (Westlaw).

117. See Hessel & Pomerantz, *supra* note 115.

118. *Competition and Diversity in Video Distribution and Carriage*, *supra* note 38, at para. 17.

119. *TCR Order*, *supra* note 36, at para. 11.

The 1992 Cable Act only prohibits competition that *unreasonably* restrains the ability of an unaffiliated network to compete.¹²⁰ The current method of prima facie review does not give sufficient weight to the reasonableness of discrimination. As discussed above, the FCC's prima facie review does not give the defendant the opportunity to seek dismissal of the complaint as a matter of law.

Because of the important role of the FCC's initial review of discrimination complaints, it is important that there is a mechanism in place that allows the defendant to demur to the complaint on the basis that, even if there is discrimination between affiliated and nonaffiliated networks, the discrimination is reasonable. This procedural change would give the FCC the ability to fulfill its statutory duty in the initial prima facie review by weighing the impact of the provider's action on the network's ability to compete against countervailing considerations which might make the discrimination reasonable under the circumstances.¹²¹

Some convincing arguments that discrimination by the cable company is reasonable under the circumstances might include (1) that the nonaffiliated network is seeking carriage on an basic expanded tier at a price that would cause a significant increase in price for subscribers, (2) that the nonaffiliated network serves a small niche audience and does not justify the per subscriber price it is seeking, (3) that the affiliated network that the cable company is discriminating in favor of is not a competitor of the unaffiliated network,¹²² or (4) that the type of programming the nonaffiliated network would provide is already widely available in the expanded basic tier of cable service. If the FCC concluded that these considerations or others outweighed any adverse impact on the ability of the unaffiliated network to compete, the FCC would dismiss the complaint.

The downfall of this approach is that it would create a procedure that could drag out the complaint process. The FCC has a statutory duty to expedite review of complaints filed by networks.¹²³ But, as discussed above, a dismissal procedure would further the statutory purpose of prohibiting only unreasonable discrimination and the procedure need not be unduly time-consuming. The positive impact of a dismissal procedure on carriage negotiations probably would justify the additional time it would take to review a complaint.

120. 47 U.S.C. § 536(a)(3) (2000); *accord* 47 C.F.R. § 76.1301(a) (2008).

121. *See* § 536(a)(3).

122. For example, suppose the cable company owned an RSN that covered a professional baseball team and the nonaffiliated network focused on fall and winter college sports. The networks would not be in competition for viewers, thus, not competitors.

123. § 536(a)(4) (Such regulations shall "provide for expedited review of any complaints made by a video programming vendor pursuant to this section.").

D. Mandatory Arbitration is Not a Reasonable Solution for All Carriage Disputes

The NFL Network has lobbied for mandatory arbitration in carriage disputes to resolve disputes in carriage negotiations.¹²⁴ The NFL's argument is that mandatory arbitration is required because "market failure has imposed substantial burdens on consumers, who are unable to access popular programming, including games of their favorite sports teams."¹²⁵ The NFL Network asserted that imposing mandatory arbitration in disputes between cable companies and networks is not unprecedented; this is what the FCC forced TCR and Comcast to do in its *TCR Order* decision.¹²⁶

The NFL Network's comparison to the TCR case is inaccurate; the TCR decision concluded that TCR had made a *prima facie* case that Comcast had *discriminated* in favor of its own RSN. So if the FCC effectively forced arbitration in that case, it did so in response to an allegation of discrimination. The NFL Network's proposal is much more intrusive into the negotiation process, and would require arbitration in all carriage disputes, not just disputes involving discrimination.

Mandatory arbitration in all carriage disputes is a remedy that is too broad given the scope of the problem. If this policy was adopted, it would involve government intrusion in business negotiations without any showing that the cable company is denying carriage based on its market power or is discriminating in favor of its own vertically integrated networks. It is difficult to see how this would be justified. It would also encourage entities like the NFL Network to demand a high carriage price and create a dispute to get cable companies to submit to arbitration. While mandatory arbitration could be justified with a showing of discrimination or abuse of market power, it would be difficult to justify when there is no such abuse.

While it would be unwise to subject parties to mandatory arbitration in every carriage dispute, it might be a good idea to make this the normal remedy when a complainant has successfully proven discrimination (or other abuse of market power prohibited by statute).¹²⁷ The FCC's order implementing the carriage regulation statutes stated that remedies would be determined on a case-by-case basis.¹²⁸ Among the remedies available include "forfeitures, mandatory carriage, or carriage on terms revised or

124. See Make, *supra* note 91.

125. Ted Hearn, *NFL Network Wants Legislators to Back Cable Fight*, MULTICHANNEL NEWS, Dec. 10, 2007, <http://www.multichannel.com/article/CA6511245.html>.

126. *Id.*

127. See 47 U.S.C. § 536 (2000).

128. *Competition and Diversity in Video Distribution and Carriage*, *supra* note 38, at para. 26.

specified by the [FCC].”¹²⁹ In litigation, the stakes over these regulations seem high. If the remedy was usually arbitration, parties that were in a position that might now result in litigation might be more willing to submit to arbitration before engaging in litigation. While this would be a desirable outcome, it would not be desirable to force *every* dispute into government-mandated arbitration.

VI. CONCLUSION

Televised sports programming is an important aspect of American culture. The attention paid to the dispute between cable companies and league-owned sports networks by politicians, the media, and the general public certainly reflects this. But for every Hoosiers fan in Bloomington, Indiana that would gladly pay an extra couple dollars a month to have the Big Ten Network, there is a political junkie, a Lifetime movie fan, and a history buff, that could not care less. In a world where both cable companies and sports leagues are pursuing vertical integration strategies by creating or acquiring cable sports networks, the FCC’s anti-discrimination carriage regulations over-serve sports fans, and under-serve (and over-charge) everyone else.

Policymakers have several options that would address the problem with the current regulations. The FCC could revise its complaint process to allow a defendant cable network to seek dismissal of a complaint if it is able to show that any alleged discrimination is reasonable under the circumstances. This would allow the FCC to determine whether the discrimination is actually inconsistent with the public interest, and thus prohibited by statute. The FCC should not adopt mandatory arbitration in all carriage disputes; this would be an unjustified interference with business negotiations in a free market. Other policies that could resolve the problem with the current carriage regulations would be a move to an à la carte cable regime, or to encourage (or require) cable companies to divest themselves of RSNs.

129. *Id.*